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No. 810

In the Supreme Court of the United States

OCTOBER TERM, 1958

ARCHBOLD VAN BEUREN, ET AL., PETITIONERS

v.

MARTIN M. McLOUGHLIN (FORMER ACTING COLLECTOR OF INTERNAL REVENUE), ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 53a–63a) is reported at 161 F. Supp. 944. The opinions of the Court of Appeals affirming the District Court (Pet. 20–29) and denying taxpayers' petition for rehearing (Pet. 31), are reported at 262 F. 2d 315 and 321, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1958 (Pet. 30). A petition for rehearing was denied on January 6, 1959 (Pet. 32). The petition for a writ of certiorari was filed on April 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether, under the terms of the trust instrument here involved, the decedent reserved a power to alter or amend the trust within the meaning of Section 811(d)(2) of the Internal Revenue Code of 1939.

STATUTE AND RULING INVOLVED

Section 811(d) (1), (2), and (3) of the Internal Revenue Code of 1939 and Rev. Rul. 55–393, 1955–1 Cum. Bull. 448, are set forth in the Appendix, *infra*, pp. 10–12.

STATEMENT

The material facts stipulated by the parties (R. 19a-52a) and found by the District Court (R. 53a–59a) are as follows:

The decedent, Mary A. van Beuren, died in February, 1951 (R. 53a). In 1932 the decedent created an *inter vivos* trust (R. 19a), by an instrument duly executed under New York law (R. 21a–33a). All questions pertaining to the validity, construction, and administration of the trust were to be determined in accordance with the laws of New York State (R. 29a). The instrument creating the trust provided for one trustee, Fiduciary Trust Company of New York (R. 21a, 56a).

By its terms the trust was to continue during the decedent's life and that of her husband and until the death of the survivor of them (R. 21a). The net income thereunder was payable in equal shares to the decedent's husband, to her son, Archbold van Beuren, and to her daughter-in-law. In the event of the death of any of them during the trust term, his or her share

was to be paid to the survivor or survivors during the remainder of the trust term. In the event of the death of all three before the expiration of the term of the trust, the income was to be paid to the issue of Archbold van Beuren *per stirpes* or if he left no issue to other designated contingent beneficiaries (R. 22a–23a).

Article Sixteenth of the trust indenture provided that the trust "may be changed or amended during the life of the trust with the consent of the Trustee and the adult Beneficiaries or adult Beneficiary then receiving the income by an instrument in writing duly executed by the Trustee and such Beneficiary or Beneficiaries." It was provided, however, that no such amendment should effect any revocation of the trust in whole or in part or alter the provision for distribution upon termination (R. 30a).

In Article Nineteenth of the trust indenture, the decedent reserved the right to remove any trustee or trustees and to appoint successor trustees (R. 31a).

An amendment, not relevant to the issue involved, was made on July 30, 1932, relating to the employment of investment counsel (R. 39a–40a). On December 30, 1946, a Second Supplemental Indenture (R. 43a–50a) amended the original indenture with regard to the transfer of various investment powers from the decedent to an individual co-trustee for whose appointment the amendment made provision (R. 57a–58a). The express terms of the amending indenture provided that Article Nineteenth "shall be amended to read as follows" and then restated with minor textual changes in terminology the decedent's reservation

of the power to remove and appoint trustees (R. 47a–48a). The text of Article Nineteenth, with amendments indicated in italics and brackets, appears in the Court of Appeals' opinion (Pet. 24–25).

The Commissioner determined that the decedent's interest in the trust (the value of the income of the trust for its duration) was includible in her gross estate, under Section 811(d)(2) of the Internal Revenue Code of 1939 (R. 53a–55a). The District Court sustained the Commissioner on the ground that by Article Sixteenth the decedent had reserved a power to alter or amend the trust with the consent of the trustee and the adult beneficiaries (R. 59a–63a). The Court of Appeals, uncertain as to the correctness of this ruling, unanimously affirmed on the alternative ground (urged by the Government in both courts below) that since, under Article Nineteenth, the decedent could remove the trustees and appoint successors, including herself, she could thereby alter or amend the trust under Article Sixteenth (Pet. 23–29).

ARGUMENT

The decision below, affirming the District Court, is in accord with established principles and is not in conflict with any other decision. Moreover, the issue presented is not of general importance in the administration of the Revenue Laws, since its resolution turns not only upon a construction of the particular terms of the trust instrument here involved, but upon the application of a provision of the federal estate tax law relating to transfers made before June 22, 1936.

1. Section 811(d)(2) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 10) provides for the inclusion in the decedent's estate of the value at the time of his death of property transferred by decedent in trust prior to June 22, 1936, "where the enjoyment thereof was subject at the date of his [decedent's] death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *." The Court of Appeals correctly held that under the trust instrument the decedent had reserved such a power to alter or amend. It ruled that under Article Nineteenth the decedent had the unrestricted power to remove and appoint trustees, including herself; and that merely by taking this step, the decedent could exercise the power under Article Sixteenth to alter or amend the terms of the trust in conjunction with other persons.[1]

This holding is in complete accord with the only case directly in point, *Loughridge's Estate* v. *Commis-*

[1] The decision below may also be sustained by the District Court's holding—which we believe correct—that the provision in Article Sixteenth that the trust could be amended "with the consent" of the trustee and the adult beneficiaries (R. 60a), reserved to the decedent the power to alter or amend in conjunction with the latter. Since the Court of Appeals was uncertain of the correctness of this ruling (Pet. 23), it affirmed on the alternative ground discussed in the text, *supra* (*Helvering* v. *Gowran*, 302 U.S. 238, 245). In so doing, it noted (Pet. 27, 28) that it assumed the correctness of petitioners' contention that Article Sixteenth gave the trustee and the beneficiaries, and not decedent, the power to alter or amend. Although petitioners now assume (Pet. 7–8) that their construction of Article Sixteenth is established, the Court of Appeals did not so hold.

sioner, 183 F. 2d 294 (C.A. 10), certiorari denied, 340 U.S. 830. In that case, the trust instrument reserved to the grantor the unqualified power to remove the trustee upon thirty days written notice and to appoint himself as trustee. The trustee was given the power to terminate the trust in whole or in part. Thus, the trustee could thereby affect "not only the time of possession and enjoyment but also the person or persons who might come into ownership and enjoyment of the property" (183 F. 2d at 300). Since the grantor had the power to substitute himself as trustee, and thereby could exercise the power to alter, amend, or revoke, he was held to have reserved a power within the meaning of Section 811(d)(2). The situation here, as in *Loughridge's Estate,* is essentially no different from those where a reserved power under 811(d)(2) is held to result when a discretionary power to alter or amend a trust is conferred upon the trustee, and the grantor appoints himself the trustee or one of the trustees. *Hurd* v. *Commissioner,* 160 F. 2d 610 (C.A. 1); *Welch* v. *Terhune,* 126 F. 2d 695 (C.A. 1), certiorari denied, 317 U.S. 644; cf. *Commissioner* v. *Estate of Holmes,* 326 U.S. 480, rehearing denied, 327 U.S. 813.

Petitioners seek to distinguish *Loughridge's Estate* v. *Commissioner, supra,* on the ground that the decedent's power to make herself a trustee under Article Nineteenth, and thereby to amend under Article Sixteenth, might have been cut off at any time without her consent by an amendment of Article Nineteenth (Pet. 8). Even assuming that the taxpayers correctly

construe the amending powers to be in persons other than the decedent (but see note 1, *supra*), the short answer is that the decedent's power to remove and appoint trustees could be cut off only by amendment, and no such amendment was ever made. Moreover, the trustees' and beneficiaries' power to terminate the decedent's right to remove and appoint trustees is basically equivalent to a provision permitting the decedent to exercise those powers only in conjunction with other persons. The Act, however, makes trust property which is subject to a power to alter, amend or remove part of the grantor's gross estate, whether such power is exercisable "alone or in conjunction with any person." See Pet. 27; *Helvering* v. *City Bank Co.*, 296 U.S. 85, 90.

In fact, the decedent reserved and retained the power to remove and appoint the trustees until the moment of her death. The necessity of taking the preliminary step of substituting herself as trustee[2] no more defeats the existence of the decedent's power to alter or amend than would the requirement of giving notice to exercise such power, which Section 811(d)(3) expressly provides does not negative the existence of such power. The holding below thus effectuates the overriding purpose of Section 811(d)

[2] Although petitioners question (Pet. 8–9, footnote 3) the correctness of the ruling below that, under New York law, the decedent could have appointed herself as trustee, they concede that there is no New York decision squarely in point. They rely on the dissenting opinion in *Loughridge's Estate*, *supra*. The majority in that case, however, agreed with the court below that under New York law the decedent had that power.

(2), which was to preclude the avoidance of estate tax liability by legal technicalities and inventive draftsmanship.

2. The decision below is not, as taxpayers assert (Pet. 12–14), in conflict with *White* v. *Poor*, 296 U.S. 98. There the grantor was one of three original trustees, who were given the powers to amend or terminate the trust and to appoint new trustees. The grantor resigned as trustee, thereby divesting herself of any share in those powers. A daughter was appointed as a successor trustee, served one year, and then resigned. The grantor was then again appointed trustee by action of the remaining trustees. In these circumstances, this Court held that the grantor's powers *qua* trustee stemmed from the independent action of the other trustees in appointing her after her daughter's resignation, and hence did not fall within the purview of the predecessor of Section 811(d)(2). Here, on the other hand, there was no interruption of decedent's powers to remove and appoint trustees, and thereby to amend. These powers were reserved upon the creation of the trust (Article Nineteenth),[a] and

[a] There is no merit to petitioners' contention that at the time of death the decedent's power to remove and appoint trustees was not "reserved" by her under Article Nineteenth but was derived only from the December 30, 1946, amendment of Article Nineteenth. The 1946 amendment did not revoke Article Nineteenth, but expressly provides that it "shall be amended to read as follows" (R. 47a). An examination of the amended Article Nineteenth, set forth by the court below with the amendments indicated in italics and brackets (Pet. 24–25), makes it clear that the only substantive changes made were to transfer certain investment powers to the trustees. Nothing in the amendatory provisions appears to repeal the power to remove and appoint trustees reserved in Article Nineteenth. In the absence of such

the decedent never divested herself of them. Since these powers were reserved and retained until her death, Section 811(d)(2) compels the inclusion of the value of the trust income in her gross estate.

In any event, the significance of *White* v. *Poor*, *supra*, is limited to transfers made prior to June 22, 1936. For, as the court below pointed out (Pet. 28), Section 811(d)(1) was added to the 1939 Code to avoid the result in that case. It explicitly provided that, with respect to transfers made after June 22, 1936, it is the fact and not the source of the decedent's power to amend that is controlling. The question of any possible conflict with the *White* case, therefore, is necessarily of only limited significance.

CONCLUSION

The decision of the Court of Appeals is correct, there is no conflict of decisions, and no question of substantial importance is presented. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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repeal provisions, the construction placed upon the 1946 amendment by the court below is plainly correct.

APPENDIX

Internal Revenue Code of 1939:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * * *

(d) *Revocable Transfers*—

(1) *Transfers after June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, * * *

(2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *

(3) *Date of existence of power.*—For the purposes of this subsection the power to alter, amend, or revoke shall be considered to exist on

the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

* * * * *

(26 U.S.C. 1952 ed., Sec. 811.)

Rev. Rul. 55-393, 1955-1 Cum. Bull. 448:

SECTION 811(d).—GROSS ESTATE: REVOCABLE TRANSFERS

Regulations 105, Section 81.20: Transfers with power to change the enjoyment.

Where the terms of an inter vivos trust created by the decedent were subject to change or amendment by the trustee with the consent of the adult beneficiary, or beneficiaries, then entitled to receive the trust income, and the decedent reserved the right to remove the trustee at any time and appoint another or successor trustee (including himself), the enjoyment of the transferred property was subject at date of decedent's death to change through the exercise of a power by him alone or in conjunction with others to alter, amend, revoke, or terminate within the meaning of section 811(d) of the Internal Revenue Code of 1939. Accordingly, the value of the property transferred to the trust is includible in

his gross estate. See *Estate of Paul Loughridge* v. *Commissioner*, 183 Fed. (2d) 294, certiorari denied, 340 U.S. 830. However, where the only right reserved to the decedent was the right to appoint a new or successor trustee (himself) in the event of the resignation or disqualification of the original trustee, and such contingency did not occur during decedent's lifetime, the enjoyment of the transferred property was not subject at date of decedent's death to change through the exercise of a power by him alone or in conjunction with others to alter, amend, revoke, or terminate. Under such circumstances, the value of the property transferred would not be includible in his gross estate. See *Estate of O. G. Jennings* v. *Smith*, 161 Fed. (2d) 74.

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